UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

November 5, 2001

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, Carol Scott and Gordana Swanson were present.

Item #1. Approval of the Minutes of the September 10, 2001 Commission Meeting.

The minutes of the October 11, 2001 Commission meeting were distributed to the Commission and made available to the public. There being no objection, the minutes were approved.

Item #2. Public Comment.

A member of the public stated that she wanted to make a comment regarding the Commission Planning Objectives for calendar year 2002.

Chairman Getman responded that the public comment portion of the meeting was only for comments regarding items not on the agenda.

The member of the public agreed to wait to make her comments until the agendized item was being discussed, noting that she would submit her comments in writing if she were unable to stay for that discussion.

Item #3. Proposition 34 Regulations: Advertising Disclosure - Second Pre-Notice Discussion of Proposed Regulations 18450.1-18450.5 and amendment of Regulation 18402, and First Pre-Notice Discussion of Proposed Regulation 18450.11.

Commission Counsel Jody Feldman presented an amended copy of the proposed regulations, reflecting concerns expressed after the agenda mailing as well as some grammatical changes. She also presented copies of the statutes. She noted that this was the second prenotice discussion for most of the proposed regulations, but the first prenotice discussion for proposed regulation 18450.11, dealing with spokesperson disclosure.

Ms. Feldman explained that Decision points 1 and 1a presented 3 options for the definition of advertisement. Option 1 listed those broadcast and print media communications that would be considered advertisements. Option 2 was a more general definition than the "laundry list" approach of option 1. Option 3 was also a general definition but with a little more specificity than option 2. Staff continued to recommend that the Commission adopt option 1 because it was clear and specific in providing guidance to the regulated community. She noted that proposed regulation 18450.1 included two subdivisions that deal with the scope of advertisement disclosure as opposed to the definition. Those subdivisions provide that the proposed sections,

except 18450.11, would not apply to slate mailer advertising, but would apply to recipient committees.

General Counsel Luisa Menchaca noted that staff could notice all three options if the Commission preferred, but suggested that the Commission may choose to narrow the options or just provide general guidance to staff in terms of the approach to this regulation.

In response to a question, Ms. Feldman stated that she researched the FTC definition of "advertising," as well as definitions in many other California statutes. Staff had incorporated language used in those definitions where appropriate.

In response to a question, Ms. Feldman explained that the language, "including a cable television broadcast" was deleted from proposed regulation 18450.1(a)(1) because it was duplicative.

Commissioner Knox noted that "television broadcast" may not include cable television if cable television is not considered "broadcast" because it is not transmitted over airwaves.

In response to a question, Ms. Feldman responded that "bumper stickers" were included in the definition because they were included in the statute.

Ms. Menchaca stated that the "…but not limited to," language in option 1 would include billboards and bumper stickers.

Chairman Getman noted that options 2 and 3 provided only a general definition, and that without a clear definition of advertisement the Commission would almost be forced to accept option 1. She suggested that the definition be further explored to see whether another definition would encompass all of the categories without having to be a "laundry list."

Ms. Feldman responded that she had looked at numerous definitions, particularly through the Business and Professions Code, and noted that virtually all of the definitions included very specific listings in the definition of "advertisement."

Ms. Menchaca noted that the statute refers to "general or public advertisement," and would allow staff to expand their research to include the definitions of "general" or "public." Staff could then provide a list of examples.

Commissioner Scott requested a list of other statutory definitions. She asked whether staff was excluding independent expenditures for advertising that does not clearly support or oppose a candidate.

Ms. Menchaca responded that this regulation would be definitional, and would apply to the other provisions that deal with contributions or independent expenditures, specifically Government Code section 84506.

Commissioner Knox noted that the language was straight from the statute, and questioned whether it might need further refinement to address Commissioner Scott's concerns.

Commissioner Scott offered to work with staff to refine the language. She stated that she was concerned about the exclusion of electronic broadcasts, and suggested that electronic broadcasts

be included. If the bipartisan Internet Political Practices task force determined that electronic broadcasts should be excluded, the regulation could be changed to exclude them at that time.

Ms. Feldman responded that staff could include a decision point on this issue the next time the regulation is presented to the Commission.

Chairman Getman stated that the Commission has not regulated web sites and e-mails yet, and that the issue would require more input and discussion. She noted that the question had previously arisen and that the Commission had decided to wait for the bipartisan commission's study of the issue.

Commissioner Scott suggested that it should be included as a decision point because some of those activities could fall under the Commission's jurisdiction.

Commissioner Knox questioned whether the language in option 1, subdivision (d)(3) included anything other than the Internet.

Ms. Feldman responded that she believed it was specifically geared towards the Internet. She explained that the Business and Professions Code considers the Internet an electronic broadcast.

Chairman Getman stated that she was not ready to make a decision on this issue because she was not comfortable with the general definition of "advertisement." She noted that option 1 might not include everyone who needs to be included.

Ms. Feldman suggested that the Commission might want to delete subsection (8) of option 1 because it may be redundant.

Chairman Getman responded that subdivision (8) contains language right out of the statute, and that including it indicates that the Commission has not yet developed the right definition and is therefore falling back on the statute. She suggested that the Commission adopt a more precise definition or use the statute as the definition, providing examples of the types of communications that would fall in the definition of "advertisement" in the regulation.

Commissioner Knox stated that the Commission could use the option 1 format with language stating, "advertisements as defined in Government Code Section 84501 include but are not limited to…" Subdivision (8) could then be deleted because it would be redundant.

Commissioner Downey stated that the Commission should have a form of laundry list, and that Chairman Getman's suggestion of examples would work. He echoed Commissioner Scott's concerns about the Internet communications because not including it could create a major loophole.

Commissioner Downey suggested that the word "and" be changed to "or" on page 2, line 7 of option 1.

Chairman Getman suggested that the proposed numerical limitation on posters did not seem to work as well as it does for mass mailings or telephone calls, and that a number lower than 200 would seem appropriate.

Ms. Feldman noted that the "200" number came from the definition of mass mailings, and provided consistency.

Commissioner Swanson agreed that consistency creates less confusion and suggested that the 200-poster minimum was an appropriate amount, because it is not economical to print less than 200.

Ms. Menchaca stated that the regulation includes the basic definition of advertisement as well as another definition dealing with distribution and dissemination to establish when something becomes an advertisement. It also explores the purpose of the advertisement. She suggested that the Commission look at those concepts separately. She noted that the Commission might decide not to include amounts depending on the ultimate objective.

Chairman Getman stated that if amounts are included, campaign buttons and bumper stickers should be included.

In response to a question, Ms. Feldman explained that skywriting was exempted because it would be too difficult to have another plane behind the skywriting plane spelling out the disclosure information.

Kathy Donovan, from the law firm of Pillsbury Winthrop, urged the Commission to consider limiting the application of the regulations to primarily formed committees. She explained her experience in trying to apply the disclosure requirements to a general purpose committee which had received over $50,000 from several contributors and then became involved in a ballot measure election by making contributions to a primarily formed committee. Government Code Section 84504 required the committee to change its name to include the special interests of its largest donors, creating an awkward and sometimes redundant committee name, and may subject the committee to an enforcement action if the name did not completely reflect the economic interests of the committee. If the application of the statutes is narrowed to primarily formed committees, it would eliminate problems associated with the political parties, other general-purpose committees, and controlled committees of candidates.

Ms. Donovan questioned whether a governor would have to change the name of his or her committee to reflect the names of major contributors if the governor gave any money to a committee that supports or opposes a ballot measure after the governor's controlled committee received contributions totaling $50,000 or more. She noted that the issue arises when applying the disclosure requirements to situations other than ballot measure committees. She added that it appears silly and misleading to the public when the name change is made.

In response to a question, Ms. Donovan stated that clarifying that § 84504 was to be applied only to primarily formed committees would be a big help. She noted that proposed regulation 18450.1(f) included a general statement applying all of the requirements to recipient committees. By requiring that the regulation only apply to primarily formed committees, the regulation would be more acceptable to the public.

Chairman Getman stated that a statewide candidate who gets involved in a ballot measure and supports an advertisement would be required to disclose, under the former rules, the name of the candidate's committee. Under the proposed regulation, the disclosure would include the name of

the candidate's committee and the names of those persons who gave $50,000 or more to the candidate's committee.

Ms. Donovan agreed, and noted that the donation may have been made years ago and the donor may have no interest in the ballot measure.

Commissioner Downey noted that a loophole could be created by Ms. Donovan's suggestion. He questioned whether it would be a disservice to the public if disclosure were not required when a primarily formed committee supporting a ballot measure received contributions from a candidate's committee, and that committee had major donors who knew that their donations may be funneled into the primarily formed committee.

Ms. Donovan responded that she did not see this as a big concern. If the candidate's committee supports or opposes one or more ballot measures, the candidate's committee has to go through the name change requirement even though it does not relate to the ballot measure. Trying to apply the requirement is difficult and could yield absurd results.

Chairman Getman suggested that, under § 84503, the definition of the person who has cumulative contributions of $50,000 or more could be defined to include any committee who contributes $50,000 or more, rather than the person who contributes $50,000 or more.

Ms. Menchaca responded that the regulation does not address that issue, but that the committee would be a person that would be considered the major donor. She agreed that a candidate's committee that donated money to a ballot measure committee would have to be named but the donors to that committee would not have to be named.

Ms. Donovan again suggested that regulation 18450.1(f), and other sections, be modified to limit the application of § 84504 to primarily formed committees.

In response to a question, Ms. Feldman stated that (f) was included as a "scope" issue. She suggested that (e) and (f) could be included in a separate regulation dealing with scope.

Ms. Menchaca stated that the language implements decisions previously made by the Commission concerning scope. Since the statutes specify "committee," staff thought it was important to reflect that in the regulatory language. Staff considered Ms. Donovan's suggested approach, but decided that the language did not support narrowing the regulation to primarily formed committees. The statutes are so intertwined that it makes it difficult to determine that regulations apply to one group of committees in one section and another group of committees for another section.

Commissioner Downey requested that staff review it again, noting that the language of § 84504(a) indicates that "any committee" shall name and identify itself. He questioned whether the gist of the subsection was aimed at primarily formed committees.

In response to a question, Ms. Menchaca stated that a candidate's committee that donates $1,000 in support of a ballot measure does not currently have to change its name. They would have to change their name if the donation was $50,000 or more.

In response to a question, Ms. Feldman stated that when a candidate's committee has a major donor who contributed $50,000 or more and the committee contributes $1,000 or more in support of a ballot measure, that committee would have to change its name to include the name of the major donor.

Ms. Menchaca stated that the regulations include limiting factors dealing with defining cumulative contributions so that the most recent contributors are captured, in order to avoid naming contributors who donated a long time ago.

Chairman Getman noted that those limiting factors do not affect this issue. She stated that § 84504 could be read to mean that it is directed toward primarily formed committees.

Chairman Getman suggested staff prepare a "laundry list" of examples of advertisements rather than defining "advertisement." She suggested that the Commission consider the proposed delivery amounts of 200/500/1,000 at a later date. She suggested that proposed subdivisions (e) and (f) involve scope issues that will need to be dealt with differently, and that the Internet issues will need to be pulled out.

Ms. Menchaca stated that staff might present two sets of regulations with regard to the scope issue, one of which would be limited to primarily formed committees. She noted that staff has tried this already and the regulatory scheme is very simple if it is limited, but the limitation may not be supported by the statute.

Chairman Getman suggested that staff explore a third version acknowledging that a consistent theme does not work and that at least some sections will have to be treated separately.

Ms. Menchaca agreed, and noted a fourth option of asking the legislature to address the issues.

Ms. Feldman explained that §84502 deals with cumulative contributions, and that the statute directs that those contributions begin the first day the statement of organization is filed. This presents logistical problems because committees are currently required to keep records for four years, but the statement of organization may have been filed more than four years ago. It may be impossible for committees to comply with the new statute. In many cases, it may not result in the disclosure that the statutes were meant to provide to the public.

Ms. Feldman stated that case law allows the Commission to adopt an interpretation that is not literal. She noted that it is important that this provision harmonize with other provisions that already exist in the Political Reform Act (Act), and that reason, practicality and common sense should be considered. She urged the Commission to avoid an absurd result in requiring cumulation from the beginning of time.

Commissioner Downey stated that the Commission must identify an ambiguity in the statute in order to do as Ms. Feldman suggested.

Chairman Getman agreed, and noted that she did not find any ambiguity. She suggested that the statute was flawed and that the Commission should ask the Legislature to fix it.

Commissioner Downey suggested that both could be done.

Ms. Menchaca stated that staff would need to look at the impact of the definition of "cumulative contributions," noting that § 84503 specifically refers to cumulative contributions and § 84504 does not. If § 84504 was treated separately, the cumulative contribution issue might have a different impact and may not be considered a big issue.

Chairman Getman noted that it only becomes a problem when it involves a recipient committee that has been in existence for years and makes occasional ballot measure contributions. Otherwise, a primarily formed committee would arise each time there is a ballot measure. In those cases the cumulative contribution rule would make sense.

In response to a question, Ms. Feldman stated that §§ 84502 and 84503 applied to § 84506, in addition to § 84504.

Ms. Menchaca noted that staff drafted the regulation to make it applicable, and that viewing § 84504 separately may eliminate the issue.

Ms. Donovan stated that it would be easier to provide that the language referring to committees or advertisements that support or oppose a candidate or a ballot measure means something that is from or generated by a primarily formed committee rather than to try to change § 84502. The primarily formed committees tend to be in existence for a shorter period of time and would not have as much difficulty providing the information required.

Chairman Getman stated that § 84503 does not need to be confined to primarily formed committees. If a candidate's controlled committee pays for an advertisement in support of a ballot measure, the candidate would have to identify on that advertisement the name of the candidate's committee and the top two donors. If that committee is a recipient committee or has been in existence, the rule would allow viewing the donors chronologically, picking up the two most recent big donors.

Ms. Donovan stated that she read it to mean that the two donors who have contributed the most money must be included, possibly resulting in naming someone who donated a long time ago.

Chairman Getman noted that the contributions will not be that old because of the new requirement that the old committees be closed out.

Ms. Donovan pointed out that the new rule will affect future cases, but not current cases. She also noted that it may not be as much of a problem at the local level where there are no limits, but that it could be for long-term office holders. The argument in favor of applying § 84503 only to a primarily formed committee is that a sponsored committee's name already identifies the sponsor, and further identifying their largest donors repeats that information.

Chairman Getman stated that § 84503 is directed more broadly, providing that a recipient committee that puts out an advertisement for or against a ballot measure must identify the largest donors to that recipient committee.

Ms. Donovan suggested limiting the definition of "advertisement" in § 84501, providing that an advertisement is an ad authorized or paid for the purpose of supporting or opposing a candidate for elective office or a ballot measure. She noted that 90% of the problems that she has been trying to deal with in the last few weeks would be solved by the § 84504 situation.

Chairman Getman pointed out that it would not appear to do what was intended in § 84504.

Ms. Feldman suggested that the Commission request legislative action to fix the statute.

Commissioner Downey stated that something needs to be done to take care of the problem until a legislative fix is made. He suggested that staff identify an ambiguity in the statute. He noted that the statute creates an absurd result, and asked whether the conflict between statutes can be used to refocus § 84502.

Commissioner Knox stated that he was not sure that the strategy would work, because the Commission cannot pour its own intentions into § 84502. As a rule of construction, generally the specific trumps the general.

Ms. Menchaca noted that staff has tried to make this work in many different ways. The statutes refer to § 84503, the basic advertising disclosure section, together with § 84504, and sometimes § 84503 is referred to along with § 84506. Trying to sort out why certain statutes were combined in certain sections is difficult and that is why staff has tried to take an approach that will work for §§ 84501 through 84510. It would be very difficult for staff to draft language that would fix it, because it is difficult to ascertain what the basic goal was. Staff did not know whether the intent was to make the statute so broad as to require every committee to amend their statement of organization every time their donors changed.

Chairman Getman suggested that, in order to get through the next election, § 84504 be applied to primarily formed committees, relying on the first phrase of the statute, and § 84503 would apply to all recipient committees, allowing a tie to chronological limits. Section 84502 would not have to be rewritten because the definition would work by limiting §§ 84504 and 84503.

Ms. Feldman noted that § 84506 has a time frame for cumulating contributions which will help.

Chairman Getman noted that, at this point, the best "band-aid" solution is to not make them work together. This would make it more complex, but workable. It provides for advertising disclosure during the next election cycle.

Ms. Menchaca suggest that staff develop regulations for §§ 84503, 84504 and 84506.

Chairman Getman asked whether the Commission agreed that § 84504 (the committee identification) should be limited, at this point, to primarily formed committees.

There was no objection from the Commission.

Ms. Feldman stated that the Commission is being asked to deal with the interpretation of the specific language, "expenditure of $5,000 or more," in proposed regulation 18450.11. Staff asked whether the Commission wanted to interpret that as a single expenditure of $5,000 or more, or aggregate expenditures totaling $5,000 or more. She reported that the consensus of the regulated community at the Interested Persons meeting was that it should be a single expenditure of $5,000 or more. Staff recommended a single expenditure of $5,000 or more.

Commissioner Downey presented a hypothetical situation wherein a celebrity is hired to videotape 5 different spots, and paid $1,000 for each spot.

Ms. Feldman responded that the committee would have to file a report if the Commission chose to interpret the $5,000 as an aggregate amount.

In response to a question, Ms. Feldman explained that the aggregated amount would be that total amount paid to a single spokesperson.

Commissioner Scott noted that if the committee paid everyone under $5,000, there would be no disclosure.

Chairman Getman explained that the $5,000 is a limit established by the statute.

Ms. Feldman stated that she tried to get assistance from the advertising community to ascertain what a spokesperson would be paid for an advertisement, but got little help from them. She noted that it may be a moot point if the spokesperson receive a lot more than $5,000 per ad, but that she had no way of knowing. She noted that the spokesperson may be paid $4,900 to make the ad, but may receive additional monies every time the ad is broadcast, making the issue more complex.

In response to a question, Ms. Feldman stated that if a spokesperson were paid in installments, and each installment was less than $5,000, disclosure would not be required if the Commission chose to interpret the $5,000 as a single expenditure.

Commissioner Scott stated that she could help staff get the factual information, but questioned whether that would address the Commission's concerns.

Chairman Getman stated that if a spokesperson is paid $5,000 or more for an appearance in an advertisement it would need to be disclosed regardless of whether it was paid in installments.

Ms. Feldman pointed out that the committee would have to know ahead of time that the spokesperson was being paid at least $5,000 in order to get the disclosure into the ad. Residual earnings would not necessarily be known ahead of time.

Commissioner Downey stated that § 82025 instructs that an expenditure is made on the date the payment is made or the date consideration is received. His example dealt with separate contracts for advertisements in which the spokesperson could receive well over $5,000 for advertisements without disclosure.

Commissioner Knox stated that § 84511 refers to payments of $5,000 or more "for that appearance." Therefore, the statute contemplates that a spokesperson could make well over $5,000 for advertising appearances and those payments would not be required to be disclosed. However, he believed that whatever regulation the Commission chose to adopt should contemplate the installment payment issue because a campaign should not be able to avoid these requirements simply by paying in installments.

There was no objection from the Commission to Commissioner Knox's suggestion.

In response to a question, Ms. Feldman stated that staff eliminated the local filing requirement because there was no authority for it.

Ms. Menchaca noted that staff would delete the reference to proposed regulation 18450.1 because it was unnecessary.

Chairman Getman directed staff to reword the definition to provide that if the spokesperson is going to be paid $5,000 or more for the appearance, regardless of when the payment is made, it will be reportable. If they are paid less than $5,000 for an appearance, it will not be reportable.

Commissioner Knox noted that it would be the promise of payment that will trigger the reporting requirement.

Ms. Feldman requested that Commissioner Scott help staff gather some of the information previously discussed.

Ms. Menchaca stated that staff would bring this item back to the Commission for adoption.

Steve Lucas, from Nielsen Merksamer and on behalf of the Yes On Prop 42 Committee for the March ballot, commented that the first part of the regulation should not try to regulate what speech has to be required in the disclosure statement. The regulation should focus on examples of acceptable disclosure statements. He noted that the option for language reading, "Major funding provided by…" would convey that the funding for the advertisement comes from the two contributors, when in fact it may not. Since the statute does not require it, he believed it might conflict with first amendment rights to tell someone what words to use.

Mr. Lucas pointed out that the draft regulation requires that the disclosure appear at the end of the advertisement, which is not required by the statute. He noted that the FCC has analogous regulations, under which some committees provide disclosure at the beginning of the advertisement, and others at the end.

Chairman Getman responded that the wording could be changed to, "Major funding for the committee provided by…"

Mr. Lucas responded that the extra words take that much more out of the advertisement time, noting that it would make a big difference in a 15-second advertisement. He suggested that if the Commission does not tell the regulated community how it must be said, the regulated community might be able to find a way to say it that would be more efficient and have less redundancy. He provided examples of statements.

Chairman Getman stated that she was not comfortable that complete disclosure would be made under Mr. Lucas's example.

Mr. Lucas responded that complete disclosure would be made because it is required in the statute. He provided additional examples.

Chairman Getman pointed out that Mr. Lucas's examples did not disclose that the contributor (a construction company) gave $50,000 or more.

Mr. Lucas responded that the statute requires that the advertisement identify the construction company that gave $50,000 or more, but does not require that the advertisement state that the contributor gave $50,000 or more.

Commissioner Scott stated that the issue was whether there should be uniformity or whether there should be some creativity that will then come back to the Commission for interpretation on a case-by-case basis through advice letters or enforcement cases.

Mr. Lucas did not believe that uniformity in regulated speech was necessarily a good thing. The Commission needed to decide whether the disclosure statement required under the statute is supposed to tell the public that the contributors gave $50,000 or more, or whether it is supposed to identify the contributors in the advertisement, possibly as major funders. He noted that option 2 would require that the advertisement identify how much the contributor gave, and that it could further burden the limited amount of time available in the advertisement, especially if the exact figure option is adopted.

Commissioner Knox stated that if the Commission required language reading, "…in excess of $50,000," the wording could be the same each time. If the amount is required to be specified, it could change from week to week.

Mr. Lucas agreed, but noted that § 84511 does not require that the amount be reported. The regulation should provide that the advertisement must include a disclosure statement identifying the top two contributors, and should provide examples without regulating exactly what speech has to be used. He suggested that the top two contributors be identified as major funders.

Ms. Menchaca responded that staff could bring the decision point back to the Commission, noting that staff read § 84505 very broadly to require the identification of "a major funding source." That provision is an enforcement provision and deals with the avoidance of disclosure in order to ensure that people do not get around the requirements.

Chairman Getman noted that the proposed regulation provides that the total amount of the expenditure be disclosed but that the statute does not require it.

Commissioner Knox stated that draft regulation 18450.11 was referring to the report made to the Commission, not to the disclosure made on the advertisement.

Chairman Getman agreed, but noted that the report made to the Commission requires that the total amount of the expenditure be reported.

Commissioner Knox noted that the disclosure is required under § 84511(a).

Chairman Getman asked whether it required the amount expended or just the fact that the committee expended $5,000 or more. She also questioned whether the report would have to be amended if additional monies were paid to the spokesperson.

In response to a question, Ms. Feldman explained that the reporting of the amount would go to the Commission and would not necessarily be included on the advertisement.

In response to a question, Commissioner Downey commented that the disclosure would provide an enforcement mechanism if an advertisement omits a disclosure.

Ms. Feldman pointed out that § 84508 provides that only one contributor has to be disclosed on the advertisement if the advertisement runs for 15 seconds or less.

In response to a question, Mr. Knox stated that the spokesperson disclosure report has to be filed within 10 days of the expenditure.

In response to a question, Ms. Feldman stated that a committee would have to file a new form each month if the spokesperson were paid on a monthly basis.

Commissioner Scott stated that monthly reporting seemed onerous unless its purpose is to cross-check another report.

Commissioner Downey noted that the statute required the report when an expenditure is made.

Technical Assistance Division Chief Carla Wardlow stated that the expenditure is made when the committee receives the goods or services. The day that the spokesperson records the advertisement would be the date of the expenditure.

Commissioner Downey noted that the statute reads, "…made on the date consideration, if any, is received," and could also include the date the contract is signed, or the date that a promise was made to perform.

Chairman Getman noted that the exact amount would not be known if the consideration includes residuals, noting that "the amount expended" required under § 84511(a) could mean "$5,000 or more." She believed that the point of that statute was to ensure that an ad includes the statement required under § 84511(b) and that every payment should not require that an additional report be filed.

Commissioner Scott noted that the Commission should only be concerned that the amount of the expenditure triggers the reporting requirement unless its purpose is to back up some other committee report.

Commissioner Knox stated that the language of subdivision (a) requires that the report be filed each time payments are made.

Chairman Getman stated that the ambiguity is in the amount, and that the Commission could define the amount to be $5,000 or more. She noted that this issue could be brought back to the Commission for further discussion.

Item #8. In the Matter of Arturo Rodriguez, FPPC No. 99/621, OAH No. N-2001040523.

There was no one present at the meeting representing Mr. Rodriguez on this matter.

Senior Commission Counsel Amy Holloway presented the proposed decision of Administrative Law Judge Spencer Joe in the *Rodriguez* case. She explained that § 87200 required Mr. Rodriguez, as an appointed member of the Planning Commission for the City of Coachella, to

file an assuming office statement of economic interest (SEI) and that Mr. Rodriguez did not file that statement. Additionally, Mr. Rodriguez did not file his annual SEI due on January 1, 1999, nor did he file a leaving office SEI when he left office. Staff issued a Probable Cause report, held a Probable Cause conference, and issued an accusation in this matter. Mr. Rodriguez issued a notice of defense, appeared for a pre-hearing and settlement conference, but did not appear at the administrative hearing on the case. Staff presented the case to the Administrative Law Judge who made a finding that Mr. Rodriguez had committed three violations of the PRA, and the judge imposed the maximum fine of $6,000.

Chairman Getman noted that the accusation cited only § 87203, the statutory provision dealing with the annual SEI. It did not cite the separate statutes governing the assuming office and the leaving office statements. The ALJ proposed decision cited only § 87203.

Ms. Holloway responded that since Mr. Rodriguez filed a notice of defense, the ALJ had jurisdiction to hear the matter. All of the provisions of the law were presented to the ALJ during the hearing. She noted that Mr. Rodriguez is an attorney and would have been aware of the provisions of law that were applicable. He had the opportunity to challenge the ALJ's jurisdiction and any deficiency in the probable cause report or the accusation, and did not do so. Mr. Rodriguez did not raise any issues of law or fact at the prehearing conference.

In response to a question, Ms. Holloway explained that, if the Commission chose to reject the ALJ decision, the Commission would be able to go back to Mr. Rodriguez in the accusation. When the Commission chooses to allow an ALJ to preside over a matter, then the ALJ has jurisdiction to oversee and hear any issues related to the jurisdiction of the case, including whether or not the accusation was properly presented and charged. She noted that those were pleading deficiencies and that it is incumbent on the respondent to raise those jurisdictional issues, and Mr. Rodriguez did not.

Chairman Getman pointed out that the purpose of the accusation is to make the respondent aware of the provisions of law he is being accused of violating.

Ms. Holloway agreed, but noted that Mr. Rodriguez had actual notice of the violations that he was being charged with, through discussions and through the factual description of the violations contained in the accusation. She believed that the Commission could fine Mr. Rodriguez for violating a statute even though the statute is not expressly cited in the accusation because Mr. Rodriguez was on actual and constructive notice of the violation. Ms. Holloway further noted that under the Administrative Procedures Act, an accusation may be amended anytime up to the submission of the case to the judge. Therefore, if Mr. Rodriguez had appeared and raised the issue, staff could have amended the accusation during the hearing to add the relevant statutes, as the facts supported that Mr. Rodriguez failed to file the three statements, and the law was presented on the three statements at the hearing.

Commissioner Downey stated that Government Code Section 11503 would have given Mr. Rodriguez a defense to the accusation.

In response to a question, Ms. Holloway agreed that Mr. Rodriguez could have challenged the accusation based on that Government Code Section. She believed that jurisdictional issues can always be waived in any proceeding as long as the respondent receives some type of notice that he or she is being subjected to some type of liability. Mr. Rodriguez had the notice.

Commissioner Downey was not concerned about the notice, but wondered whether it was possible for Mr. Rodriguez to waive the jurisdictional issues under the mandatory language of the statute.

Ms. Holloway responded that she believed that there was a notice issue. She noted that the accusation may not have included the right code sections, but the provisions were referenced factually in the accusation and raised the issue. She believed that Mr. Rodriguez waived any jurisdictional defect by failing to appear, and that he had sufficient notice that there might be a jurisdiction issue.

Chairman Getman requested that Ms. Holloway research the issue to find support that the jurisdictional issue can be waived.

Commissioner Knox pointed out that, if this were a civil lawsuit, any irregularity in a pleading that is not challenged at trial would be waived as grounds for an appeal or other challenge to the trial's outcome.

Chairman Getman questioned whether, assuming that Mr. Rodriguez waived any jurisdictional defense, the Commission should adopt the ALJ decision if it wants to adopt the fine level of $6,000, or whether they should reject the decision, review the record and write another decision correcting the record.

Ms. Holloway responded that, unless the Commission wishes to raise the fine, the record does not need to be reviewed. She agreed that since the proposed decision does not address the right statute it would be a technical consideration, and that the Commission could properly correct what statutes are being addressed. She believed that it is important to correct it because Mr. Rodriguez has the right to appeal the decision. She recommended that the Commission make the changes to the code sections that are cited and cite all three statutes as the violations. She did not believe that the Commission needed to review the record to do that.

Chairman Getman noted that it would then be treated like a clerical error, and she requested that staff research to find support for that action.

Ms. Holloway suggested that staff request that the ALJ correct his proposed decision to adequately reflect the evidence that was presented at the hearing.

In response to a question, Ms. Holloway stated that there may be procedural aspects related to serving the respondent that will need to be addressed. She believed that the Commission should know (1) whether jurisdiction can be waived, (2) whether this is a clerical or technical error that can be corrected on the face of the proposed decision, and (3) whether the decision can be returned to the ALJ. She suggested that staff research those issues and return to the Commission later in the day.

Chairman Getman noted that the Commission will have discussions with legal division counsel regarding this matter during the closed session portion of the meeting.

The Commission adjourned to closed session at 12:00 p.m.

The public session reconvened at 1:08 p.m.

Ms.Holloway stated that staff had conducted additional research and found two cases discussing the pleading requirements of accusations. The *Val Stearns* case involved notice and due process issues. *Tom Smith v.California State Board of Pharmacy* relied heavily on the *Stearns* analysis about the requirements of the accusation. The general rule provided that, so long as the respondent is informed of the substance of the charge and afforded the basic appropriate elements of procedural due process, he cannot complain of a variance between the administrative pleadings and the proof. In both cases the respondent challenged the sufficiency of the pleading in the accusation on the basis that the accusation was not specific enough or did not properly cite the statutory basis. In *Smith* the court found that the accusation was insufficient because the first reference to what the respondent was actually being charged with was during the closing argument. The court looked at the accusation, the pre-hearing conference statement and the evidence presented at the hearing to determine whether evidence was presented at any stage and whether the respondent had sufficient notice of what was being alleged. Ms. Holloway noted that the prehearing conference statement in the *Rodriguez* matter specifically addressed the three statutes.

Ms. Holloway stated that, in the *Stearns* case, the court looked to see whether the accusation had been sufficiently pleaded and whether there was a variance between the pleading and the proof. The court ruled that no variance between the allegation, the pleading and the proof is deemed to be material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

Ms. Holloway stated that staff believed this to be a notice issue and that there was sufficient notice to the respondent. She explained that the Commission could, under § 11517, adopt the proposed decision in its entirety, reduce or otherwise mitigate the penalty, make technical or other minor changes in the proposed decision and adopt it as the decision. She noted that there is not sufficient case law for guidance, but that staff believed that it is possible to insert Government Code Sections 87302 and 87304 in paragraphs 4 and 6. Another option would be to remand it to the ALJ and ask him to amend his proposed decision to conform to the evidence that was presented at the hearing. She noted that she discussed (without mentioning the facts of the case) the issues with the presiding judge, and the judge advised her that there would be no problem with remanding the case to the ALJ.

In response to a question, Ms. Holloway stated that since there are no procedural specifications in the Act, the Commission could be guided by civil law. There could be a motion remanding the proposed decision to the court, with service on the respondent, so that the respondent would have the opportunity to object at that point. She did not believe that it would provide an opportunity for the respondent to produce evidence even though he did not previously do so.

Ms. Holloway recommended that the Commission make technical changes if they were comfortable with that, or remand the decision to the ALJ. She did not recommend that the Commission review the transcript and make a decision based on the transcript. She believed that, if the respondent sought a Writ of Mandate, the fine would stand the best chance of being upheld if the Commission remanded the decision to the ALJ.

Chairman Getman stated that the Commission had made the same decision during closed session deliberations. She announced that the Commission decided to remand the case to the Administrative Law Judge with a request to conform the decision to the proof at the hearing.

Item #6. Conflict of Interest Regulations Improvement Project-Application of Regulation 18707.4.

Staff Counsel Bill Williams reported that staff had conducted a further internal review of proposed amendments to regulation 18707.4, and concluded that there was a need to determine policy issues before considering any amendments.

Mr. Williams explained the "public generally" exception for certain types of boards and commissions. He noted that legislation creating the boards and commissions is the key to the policy issue in question. That legislation envisions that the board member will have certain levels of knowledge and expertise flowing from the member's economic interest that is important to the mission of the board or commission. That same economic interest, however, can also create a conflict of interest, precluding the board member from participating in the process.

Mr. Williams presented a staff memo which outlines the history of the issue. He noted that advice letters regarding this issue reflect both narrow and broad interpretations. The overall trend has been toward a greater breadth for the "public generally" exception.

Mr. Williams asked the Commission to consider whether the regulation should provide greater flexibility or maintain the status quo to prevent the danger of legislative circumvention of the conflict of interest provisions of the PRA. He explained that the LA Care issue brought this to the attention of staff. That issue involves the creation of a quasi-governmental agency by the enabling statute, whose purpose was to coordinate and assure the provision of quality health care for medical recipients and other underserved communities by offering managed care health services. That legislation knowingly put stakeholder service providers on the governing board because of their expertise as well as their interest in health care services.

Mr. Williams provided the Commission with a number of letters regarding the issue in the staff memo. He noted that a letter from the consumer advocate who sits on the board for LA Care was the most interesting because he indicated that when board members are disqualified from participation because of a conflict, a lot of insightful information is not included in the discussion for the remaining members.

In response to a question, Mr. Williams stated that the reason for the provision in the regulation that, "…the member is required to have the economic interest the member represents…" is not clear from the history of the regulation. He inferred that the economic interest language is a broader provision of a requirement in the original regulation.

Chairman Getman questioned whether the provision would allow people to take advantage of the exception only if they clearly have a conflict.

Mr. Williams responded that when legislation creating boards and commissions gives people a "pass" on the conflict of interest provisions of the PRA, it raises the potential for legislative circumvention of the conflict of interest provisions of the Act. In the case of LA Care, it would

appear appropriate to have board members who have a certain level of expertise, but, as illustrated in the Spriggs letter, a generalized business interest was sufficient to apply the exception. The exception, if broadened, could render ineffective the conflict of interest rule generally because the legislature has already created many of these boards and commissions and the members of those boards and commissions are basically given an exemption from the conflict of interest provisions.

Chairman Getman understood that it is an important policy concern, but questioned whether this was the best way to address the issue.

Commissioner Scott, in response to a hypothetical situation presented by Chairman Getman, stated that this case involved stakeholders in the issue, not attorneys representing the stakeholders. She noted that the case involved one provider versus another provider and one contractor versus another provider.

In response to a question, Mr. Williams pointed out that the LA Cares situation is just one example of how this situation could arise. The issue can also arise in a non-economic setting where a certain level of expertise is important. He noted that, under Proposition 10, if a chairman of a commission was a member of a community based organization and was a psychologist who had expertise in child care, the chairman, because of that expertise, had conflicts. The situation presented in the LA Care situation involves actual stakeholders and if they cannot participate, it undercuts the intent of the legislation in terms of the competitive process.

Commissioner Scott disagreed because not all of the stakeholders are at the meetings so it is not an open process. It does not affect everyone the same way. She agreed that there may need to be a fix for this situation, but it is not in the "public generally" regulation because it does not affect the "public generally." She did not agree that expanding the "public generally" exception is the appropriate avenue for remedying the issue.

In response to a question, Mr. Williams stated that a developer who was appointed to represent developers could take advantage of this regulation, but that a person representing developers who was not himself a developer could not take advantage of the situation in theory. However, the *Dorsey* informal advice letter advised that an individual who was representing a stakeholder in the LA Care matter and did not have an economic interest was allowed to participate. It illustrated the type of case where someone might fit the spirit but not the letter of the regulation.

Mr. Wallace clarified that part of LA Care's concern was that subdivision (a)(2) has become a form-over-substance requirement. He stated that it can almost be read to require that the statutes somehow expressly provide that a source of income in this field is required. If someone is appointed to represent a specific industry, that person should be able to make a decision that affects that industry.

Chairman Getman noted that subdivision (a)(2) allows that only when the person is a part of the industry.

Mr. Wallace stated that it is difficult to interpret (a)(2) unless it is linked with subdivision (a)(3). That would suggest that if a person is appointed to represent one interest, that person cannot participate if the decision will affect some other interest of that official.

Chairman Getman noted that (a)(2) must have a reason, otherwise it does appear to be a form over substance.

Ms. Menchaca explained that a literal reading of the regulation would not allow the exception to be applied to the attorney representing the stakeholder. Advice letters, however, have allowed that exception because staff has looked at the overall intent of the regulation. She noted that this was part of the Phase 2 project because staff believed that they had gone beyond the literal language of the regulation.

Chairman Getman stated that going beyond the literal language of the regulation makes the regulation too broad.

Mr. Williams stated that he originally shared Commissioner Scott's concern that the "public generally" exception is not the appropriate vehicle for these changes. However, he read the *Consumers Milk Advisory Board* case, and concluded that, even though it creates a certain type of exemption, it is an exemption that has been certified by an appellate court as being an appropriate application of the "public generally" exception and therefore an appropriate way for the Commission to address the issue.

Commissioner Scott stated that she believed that there is a bigger issue with regard to what LA Care is. She explained that LA Care is one of three competing health plans in an economic market. She questioned how the *Milk* case applied to this case.

Mr. Williams explained that the *Milk* case set the standard for a whole industry, and that the court sanctioned the usage of the "public generally" exception in the context of something that was going to have a special effect on an industry. If the voting person receives a specific economic benefit out of the vote it was still permissible to vote if the industry was affected. He realized that the LA Care situation involved a smaller subset, but noted that the LA Care issue was not before the Commission. He explained that the purpose of the discussion was to decide whether to amend the regulation.

Commissioner Scott stated that the regulation is not the appropriate vehicle for resolving the issue presented in the staff memo because there are not enough facts presented on the types of decisions that are made. Unlike the *Milk* case, the proposal included deciding which providers can participate and which plans will be contracted with. She agreed that expertise is important, but there should also be a better mechanism to keep people from having a conflict of interest. She did not agree that it would be difficult to find people to serve on boards. She suggested the current economic climate requires that the Commission look more closely at conflicts rather than waiving them.

Mr. Williams responded that staff presented this issue to the Commission so that they could decide whether the proposed regulation was appropriate. He explained that he did not believe that there was a recruitment problem for these boards and commissions because of the current application of the regulation.

Maureen O'Haren, representing LA Care, commented that they have had many problems with the PRA and Government Code Section 1090. They sponsored SB 720 (Margett), working with FPPC staff, to help deal with the issues. LA Care believes that regulation 18707.4 is the

appropriate vehicle to address the problems. She noted that they deal with decisions that affect contractors and providers within the LA Care network. In addition to their problems with regulation 18707.4(a)(2), they have a problem with the jurisdictional question. The *Dorsey* advice letter indicates that the "public" is LA county, but they believed that their decisions only affect only those physicians that contract with the plan partners in LA Care. Additionally, they cannot determine from the regulation what percentage to apply. While applying the 25% for business entities would work for some of their board members, it could create an imbalance among the board members. There is currently an imbalance because the consumer members of the board can most often vote, but cannot receive the expertise of colleagues.

In response to a question, Ms. O'Haren explained that there is one consumer member and one consumer advocate on the board.

Ms. O'Haren guessed that (a)(2) was included in the regulation because it was intended to define those boards and commissions where members have specifically been appointed to represent and advocate for an economic interest. She believed that (a)(1) handles the issue sufficiently. She believed that the legislature intended that their board be a balanced group of stakeholders who would have to reach a consensus, and that the balance is not achieved when members are conflicted out of the process.

In response to a question, Ms. O'Haren stated that their decisions affect only doctors and members of LA Care, but that their decisions regarding policies and contractual terms might affect persons who are deciding whether to become members of LA Care.

Commissioner Scott asked the LA Care representatives to define who their stakeholders are, and whether they could suggest a way to resolve this issue by dealing with boards like theirs instead of fitting it in the "public generally" provisions.

Augustavia Haydel, General Counsel of LA Care, clarified that their organization is the local initiative health plan for Los Angeles county, and that it is part of an experiment implemented by the state to move Medi-Cal beneficiaries into managed care. LA county has two plans. LA Care is the government plan and Healthnet is the commercial plan. LA Care's mission includes providing quality services and to ensure the survival of the traditional and "safety net" providers in LA county. The legislature was concerned that initiating managed care could put those providers who routinely provide services to Medi-Cal beneficiaries behind by the competition brought on by managed care.

Ms. Haydel explained that LA Care has 13 seats nominated by stakeholder organizations including LA County (4 seats), LA County Medical Association (1 seat), federally qualified clinics (1 seat), community free clinics (1 seat), children' providers council (1 seat), consumers (2 seats), the California Association of Health Plans (1 seat), and Health Care Association of Southern California (2 seats). She noted that the board members do not have to be members of the stakeholder organizations, but must represent them.

Commissioner Scott noted that heads of clinics and doctors have served as members.

Ms. Haydel responded that the chairman of LA Care, is a former dean of USC medical school and is currently a retired physician. He no longer has an economic interest but the board relies on his expertise.

In response to a question, Ms. Haydel stated that LA Care would be happy to work with the Commission staff to devise a more narrow remedy for LA Care specifically, but did not know how that would be fashioned. She explained that the balance brought to LA Care by legislative action is very important because of the complexity of the issues they routinely face. The various interests are represented on the board as a check and balance on each other, and, if the "public generally" exception is fashioned to address the issue, the balance should be left intact while at the same time contain any taint that might come from any board member conflicts.

In response to a question, Ms. Haydel stated that their chairman does not have a conflict. Recently, the board had to discuss the extension of their main contract with the State Department of Health Services (SDHS), and both their plan partners and plan provider representatives were prevented from participating in that decision. The SDHS contract lists specific health services that the board must provide, and it lists various administrative procedures that the board must comply with. The issues presented in that contract flow through to the board's other contracts with subcontractor HMO's and then through to their subcontractors. The issues of financial control and maintaining a certain level of quality that are important considerations in those decisions cannot be fully discussed because those board members with expertise in those areas cannot participate due to a conflict. She noted that it is not always easy to discern how much of a financial impact a particular quality issue might have on a provider or an HMO.

Chairman Getman noted that the letter from Mr. Carl Coan illustrated that he worked for a clinic that receives payments from LA Cares and was prohibited from participating in the decision for the state contract. She noted that if his clinic was affected in proportionally the same manner as all other clinics he would have been able to participate.

Mr. Wallace responded that LA Care did not believe that the "public generally" regulation applied.

Commissioner Scott questioned whether Mr. Coan had a conflict. She noted that if every clinic is affected the same way the conflict may not prohibit him from participating.

Commissioner Swanson suggested that the Commission wait until Steve Dorsey, Special Counsel to LA Care, can respond to some of the Commission's concerns before making a decision.

Mr. Wallace stated that Mr. Dorsey believed that subdivision (a)(2) seemed to require that an economic interest is held, and that the standard "public generally" rule does not apply to a single industry, trade or profession. The regulation was specifically intended for industry boards, where industry members made decisions that affected their own industry. Staff found that some boards that did not fit into that framework, and began to deal with the issue during their Phase 2 project.

Chairman Getman stated that part of the issue was whether the regulation still makes sense, and if there is a way to accommodate the legitimate issues of different boards and commissions without hurting the conflict of interest rule. She agreed that balance is needed, but questioned whether subdivision (a)(2) is the best answer because it may exempt too many people from the conflict rules.

Commissioner Scott agreed, noting that there should not be participation when a true conflict exists, and she questioned whether this should be dealt with under the "public generally" rule.

Mr. Williams stated that staff believed that there was an ongoing issue of the use of this variant of the "public generally" exception for the last 15 years, and that LA Care was just one example of it. The fundamental issue was whether the Commission wanted to approach the issue with a regulation. He noted that LA Care is also blocked from the "public generally" exception because, if they must use LA County as their jurisdiction, they cannot use the "significant segment" portion of the regulation or the provision for industry dominated commissions.

Commissioner Scott requested that staff explore the types of conflicts that are a concern as well as what the mission of the board is. She suggested that another analogy could be developed.

Commissioner Knox asked what protection the public gets out of regulation 18707.4(a)(2).

Mr. Wallace stated that he thought it was more of a redundancy to the other standards. The biggest safeguards in the regulation are included in 18707.4(a)(3) and (4), and staff initially believed that subdivision (a)(2) could be eliminated.

In response to a question, Mr. Williams stated that limiting language is constricting. The use of the "public generally" exception in this regard was an imperfect tool for this type of legislation, but it had some judicial sanction to it and may be the only tool available to address these types of situations.

In response to a question, Ms. Menchaca believed that subdivision (a)(1) and (a)(2) must be read together. Subdivision (a)(1) looks at the declaration in the legislation of some benign purpose. Subdivision (a)(2) ensures that there is a link from the board member to that purpose. Most recently, the question has been whether the factors should be kept focused on the term "economic interest," and whether it could also include special interests. Since this is an exception, there is nothing necessarily limiting the Commission from focusing on the economic interest, but the history of the regulation shows that the emphasis has been on that focus.

Commissioner Knox suggested that the regulation be reworded to read that the member is required to have or is on the board to advocate or represent a seat allocated to a certain economic interest.

Ms. Menchaca responded that if staff were able to draft very narrowly tailored language that would meet enforcement concerns it would work, but that staff had not yet found that language.

Commissioner Knox noted that, under his suggestion, subdivision (a)(1) would provide that the law creates these posts that are to be allocated to various economic interests and that a person in that post is presumed to be a spokesperson, to some extent, for that interest. Subdivision (a)(2) would then be unnecessary.

Ms. Menchaca responded that subdivision (a)(1) limits the Commission to § 87103(a)(d), which enumerates certain economic interests. The discussion involves persons who represent certain special interests but not necessarily economic interests. The fundamental issue is whether staff should try to expand on the notion of economic interests because it would send a signal to the

legislature that the new boards and commissions that require people to represent more than an economic interest are still within the purview of the PRA.

Chairman Getman noted that this regulation is one of the very few regulations that has judicial sanction. If the Commission chose to approach the issue, they may want to rework the regulation, not necessarily to make it broader or narrower, but to make it more tailored so that it can be applied correctly. She requested that staff be allowed to proceed with this project and look at drafting a regulation without yet deciding whether it should be broader or narrower. She noted that the staff memo shows that the regulation has much broader implications for different kinds of commissions and the Commission must be very careful to avoid damaging the conflict of interest regulations.

In response to a question, Chairman Getman stated that staff should start from scratch, looking at the new types of Commissions and asking if the PRA intended to allow these types of commissions to proceed despite an obvious conflict.

Commissioner Scott suggested that staff consider that not all commissions are the same, and that there may be distinctions between different types of commissions and the different types of conflicts that might exist for the members of those commissions.

Commissioner Swanson stated that the boards and commissions are probably not very different than they were a long time ago. She was concerned that, while trying to bend over backward to accommodate the concern of LA Care, the Commission may open a floodgate of different violations that will come before the Commission that would not have resulted in an enforcement action before. She urged staff to be very careful, noting that the regulation may be more foolproof now than it would be if changed. If it is changed to include the concern of LA Care, it should be very narrowly defined. It should be presented to the Commission with a thorough discussion of how it will affect the FPPC and whether it is being fair to the public in enforcing the conflict of interest laws.

Chairman Getman stated that the Commission wanted staff to explore language that works better but looks at whether the new commissions are different than the commissions that previously existed.

Commissioner Knox asked staff to look at whether subdivision (a)(2) served any real purpose and how "significant segment" should be defined for the purposes of subdivision (a)(4). He was not sure that a percentage base was appropriate and asked staff to look into refining it to make it more user friendly.

Mr. Williams asked for confirmation that the Commission was not going to consider any decision points presented in the staff memo, but instead request that staff come back to the Commission with ideas.

Chairman Getman agreed, and directed staff to treat it as if they were facing the same problem that staff faced 25 years when the regulation was first enacted.

Item #4. Proposition 34 Regulations: Personal Loans (§ 85307) -- Second Pre-Notice Discussion of Regulation 18530.8.

Staff Counsel Holly Armstrong presented this proposed regulation, noting that regulation 18530.7, dealing with extensions of credit, was previously associated with this regulation. Staff believed that regulation 18530.7 should be considered as a separate item as a result of the discussions at the September 10, 2001 meeting.

Ms. Armstrong explained that staff was presenting 3 decisions for the Commission's consideration. The first decision concerned whether personal loans made by a candidate to his or her campaign prior to January 1, 2001 count toward the $100,000 limit imposed by § 85307(b). The second decision concerned whether the $100,000 personal loan limit imposed by § 85307(b) is applicable on the basis of each individual election (with the candidate receiving a new $100,000 limit for each election), or whether the $100,000 limit applies to all of the candidate's loans to his or her controlled committee formed for the purpose of seeking a specific elective state office (comprising both the primary and general elections). The third decision concerned whether a loan to a candidate from a commercial lending institution (for which the candidate is personally liable), which the candidate then lends to his or her campaign, counts toward § 85307(b)'s $100,000 limit.

Ms. Armstrong explained that option "a" of decision 1 provides that pre-January 1, 2001 loans do not count toward the § 85307(b) limit, and option B provides that those loans do count toward the limit. Option C provides that pre-January 1, 2001 loans only count if used in a post-January 1, 2001 election, but that if such loans exceed $100,000 it does not constitute a violation of the PRA. Option B might be a retroactive application of the statute. Staff recommended option A, which would be consistent with the Commission's actions on § 85316.

Commissioner Swanson moved that option "a" be approved. The motion was seconded by Commissioner Knox.

There was no objection from the Commission.

Ms. Armstrong explained that option "a" of decision 2 provided that the $100,000 personal loan limit would apply to the aggregate of all of the candidate's personal loans to his or her controlled committees organized for seeking a specific elective state office, including the primary and general elections. She noted that the regulation should specify other types of elections that might arise, such as special elections and special runoff elections, and that staff will include those if the Commission chooses option "a." Option "b" provides that the $100,000 personal loan limit applies to each individual election, with the candidate receiving a new $100,000 balance with each new election. Both options are viable and supportable.

In response to a question, Ms. Armstrong stated that option "a" would not conflict with anything the Commission has already decided with regard to Proposition 34, and would be consistent with the Commission's decision at the October meeting with regard to the carryover issue.

Chairman Getman noted her concern that the $100,000 limit for the primary election not be carried over to the general election because it could result in a $200,000 outstanding loan balance which would counteract the statute. She supported option "a."

Commissioner Downey moved that option "a" be approved. Commissioner Swanson seconded the motion.

Chairman Getman noted that the language would need to be consistent with decision 1. She suggested that it read, "$100,000 loan limit…" rather than "$100,000 personal loan balance…" She suggested that either the primary and general election language be deleted, or they be kept but the special primary and special general elections be added.

Jim Knox, with California Common Cause, questioned whether an incumbent running for reelection who had an outstanding $100,000 loan balance carried over from a previous election could loan the new campaign an additional $100,000.

Chairman Getman responded that the Commission had previously decided that it would be permitted because there would be separate committees for each campaign.

Ms. Armstrong stated that this decision was not yet incorporated in the new regulation but that something could be included. She noted that it could be included in the redesignation regulation.

Chairman Getman suggested that it could be clarified in proposed regulation 18530.8(d).

Ms. Armstrong stated that decision 3 option "a" provides that the proceeds of a loan from a commercial lending institution to a candidate which the candidate then lends to his or her campaign does count toward the candidate's $100,000 personal loan limit. Option "b" provides that those proceeds would not count towards the candidate's $100,000 personal loan limit.

Commissioner Knox questioned what weight, if any, should be given to subdivision (a), which states that the article does not apply to loans made to a candidate by a commercial lending institution in the lender's regular course of business. That could be construed to mean that if the candidate borrows money from a local bank and then loans it to his or her campaign, then it is not subject to the $100,000 limitation. If it is looked at as a two-step transaction, as suggested in the staff memo, he questioned where else in the PRA an application could be found for the language in subparagraph (a).

Ms. Armstrong responded that subdivision (a) could also refer to the contribution limits in §§ 85301 and 85302 because loans are contributions. Thus, while the contribution limit sections do not refer specifically to loans, they do refer to loans because loans are included in the definition of contributions.

In response to a question, Ms. Armstrong stated that a bank would not be considered to have made a contribution over the limits by making a loan to a candidate.

Commissioner Downey noted that since bank loans are already excluded the proviso in § 85307 would not be needed to escape a bank making a contribution.

Ms. Armstrong agreed.

Commissioner Knox observed that the language of subdivision (a) has no application unless it is read with subdivision (b).

Chairman Getman noted that it means that the loan limit does not affect the candidate unless the candidate gets the loan from a bank. She stated that it could be the correct construction because § 85307 is the "wealthy candidate" provision, providing that you cannot limit how much money a wealthy candidate gives to his or her campaign but you can limit how much the wealthy candidate loans to his or her campaign.

Ms. Armstrong agreed, noting that if the $100,000 loan limit is not applied to the bank loan, the voluntary expenditure limits would never be met.

Chairman Getman observed that a candidate could get a $300,000 loan from a bank, loan it to his or her committee, and the voluntary expenditure limit is not lifted for anyone.

Commissioner Knox noted that if subdivision (a) is not read with subdivision (b), then subdivision (a) has no weight.

Ms. Wardlow confirmed that there is no way a loan from a bank could be considered a contribution. There are situations where a candidate will have other people co-sign for a loan, and those persons are considered to have made a contribution. Under Proposition 34, each of those guarantors would be limited to $6,000.

Chairman Getman explained that once a candidate has loaned his or her committee $100,000 in personal money, the voluntary expenditure limit is lifted for everyone in the campaign. However, if bank loans are not included, a candidate could get a line of credit for $200,000, loan it to the committee and the expenditure limits would not be lifted because the source of the money was not the candidate's personal funds.

In response to a question, Ms. Armstrong stated that banks do not generally loan money to a committee, unless it is personally guaranteed by the candidate.

Chairman Getman stated that she did not like option "b" but that she did not see any other option. She suggested that the Commission could write a letter to the legislature asking for clarification.

Commissioner Swanson moved that the Commission approve option "a."

The motion failed for lack of a second.

Chairman Getman moved that the Commission approve option "b."

Commissioner Knox seconded the motion.

Chairman Getman recommended that the Commission propose legislation that would allow option "a."

Jerry Nottleson, from Franchise Tax Board, suggested that the statute does not apply to loans made to the candidate. If the candidate had an outstanding balance he can loan it to the committee. This would not preclude the candidate from going to a bank for a loan, and then contributing it to the committee.

Ms. Wardlow pointed out that if the monies are used for campaign purposes, repayment of the loan would still be considered an expenditure.

Commissioner Knox stated that, under Mr. Nottleson's suggestion, a candidate could borrow a million dollars, but could only loan up to $100,000 to the campaign, and could then contribute the rest to the campaign.

Ms. Wardlow stated that, in the past, the payments the candidate made to the bank to repay the personal loan would have been considered additional contributions from the candidate or additional expenditures by the candidate out of the candidate's personal funds. Those would be subject to limitations under Proposition 34.

Chairman Getman stated that the Commission should reconsider that application since there are now limits.

Commissioner Downey noted that the candidate only has expenditure limits if the candidate agreed to them.

Commissioner Swanson noted that if the candidate has a bank loan the candidate then becomes a wealthy candidate.

Ms. Armstrong observed that only a wealthy candidate could borrow that much money.

Commissioner Swanson noted that the candidate could borrow against a house.

Chairman Getman agreed that the $100,000 loan to the committee should count, but questioned whether contributions made for the purpose of repaying the loan would be considered an additional expenditure. She questioned why it should matter whether the additional $900,000 contribution came from personal funds or a loan.

Ms. Wardlow stated that it is based on having to disclose the true source of money flowing into the campaign.

In response to a question, Chairman Getman stated that the candidate could not accept contributions after winning the election for the purpose of repaying the loan.

Ms. Wardlow stated that candidates have asked if they can close out bills incurred by committees by paying the bill personally, and that the FPPC has advised those candidates that they cannot.

Chairman Getman stated that the options are (a) the Commission ignore the plain language and accept option "a," (b) a reading of the plain language, or (c) the possibility of defining what "a" refers to.

Commissioner Knox noted that option "a" and Mr. Nottleson's suggestion both involve a 2-step transaction and do not address the issue of giving some weight to the language in subdivision (a) about the article not applying to loans from a commercial lending institution.

Chairman Getman responded that it provides that the candidate can have a loan of much more than $100,000 from the commercial lending institution, but that the loan limit of $100,000 would

apply to how much of that bank loan the candidate could loan to his or her committee. It would not restrict how much the candidate could give to the committee.

In response to a question, Chairman Getman stated that there were no restrictions precluding the candidate from donating $900,000 of borrowed money to his or her campaign. Under option "b," if the candidate loans the campaign more than $100,000, the voluntary expenditure limits are lifted for everyone. The provisions of option "a" would not apply the $100,000 loan limit to a loan made from a bank to the candidate unless the candidate loans the proceeds to his or her committee.

Commissioner Downey stated that if "a" were not used, the result would be the same. There would be a $100,000 loan limit, and no restriction on how much the candidate can borrow from the bank. There would be no restriction on how much the candidate could donate to the committee.

Ms. Armstrong stated that Commissioner Downey's suggestion would impose a $100,000 limit and would require the candidate to donate portions of the bank loan instead of lending it. Option "a" would provide that the $100,000 limit does not apply so she did not see how the proposed third option would get around option "a."

Chairman Getman suggested that staff review decision 3 to see whether Mr. Nottleson's interpretation would work and bring it back to the Commission in December.

Ms. Wardlow stated that she will be getting questions asking why a candidate's best friend cannot loan the candidate $100,000 for which the candidate will be personally liable and will donate to the campaign.

Chairman Getman responded that the statute does not provide for that because it deals only with loans from a commercial lending institution.

There was no objection from the Commission to reviewing Decision 3 again in December.

The Commission adjourned for a break at 3:00 p.m.

The Commission reconvened at 3:20 p.m.

Item #14. Adoption of Planning Priorities for Calendar Year 2002.

Chairman Getman noted that a comment letter from Secretary of State Bill Jones was received earlier in the day regarding this item and that copies were available for the public. She explained that each year the Commission discusses the planning priorities for the upcoming year, considering the regulation calendar and a planning priorities document. This year, staff is asking the Commission to decide between two possible priority items for next year. Each of these would be in addition to the ongoing work of the Commission as well as interpreting and applying Proposition 34. These jobs are going to become increasingly difficult given the budget cuts and staff reductions that the agency will be facing next year.

Chairman Getman explained that the planning priorities were developed by the executive staff with participation of Commissioner Downey. Each member of the staff was asked to propose

priority items, and they developed a list of items. Executive staff considered the list, weighing the importance to the public, whether there was anything staff could accomplish if they worked on an item, what kind of resources would be required, and the staff's ability to complete the project within a reasonable period of time.

Chairman Getman presented the two priorities identified through that process. The first was the development of an enforcement priorities plan and the second was a review of the FPPC's role in reviewing conflict of interest codes and statements of economic interest that are filed by state employees.

Colleen McAndrews, from Bell, McAndrews, Hiltachk and Davidian, commented that the enforcement process and the role of the Commission needs to be reviewed. She urged the Commission to consider whether enforcement's purpose is to achieve compliance or punish wrongdoers. She believed that the system was "irrational" and difficult to deal with. She believed that staff sometimes aimed at smaller things instead of the big picture. Public officials are not sanctioned by a fine, they are sanctioned by bad publicity because it creates an opportunity for the opposition to use it against them in the next campaign. Those public officials are more than willing to pay the fines. Non-public officials are affected by the fines, but the system does not reflect that. She opined that treasurers are so fearful of making inadvertent mistakes that it is becoming increasingly difficult to find expert people willing to serve in those positions. She stated that reports with egregious errors (possibly negligent or intentional) made by amateurs are not dealt with as harshly as inadvertent clerical errors made by the experienced treasurers.

Ms. McAndrews stated that the fines are sometimes considered the cost of doing business, but she questioned whether that was a fair charge. The Commission does not evaluate whether the conduct in an enforcement case is intentional or an accidental mistake. She has seen stipulations that appear to be intentional misconduct and yet it is not reflected in the agreement. She urged the Commission to prioritize the enforcement issues.

Jim Knox commended the Commission for its interval review of the conflicts of interest, specifically the filing and monitoring of statements of economic interest. He agreed that there is a need to improve and strengthen the role of the Commission in this area. He encouraged the Commission to use its expertise by taking measures on its own, in cooperation with other agencies, to improve monitoring, identification, and enforcement of conflicts of interest. He did not think that it would require a lot of resources, and encouraged a pro-active approach instead of waiting passively for a legislative fix.

Mr. Knox encouraged the Commission to include the conflicts issue as part of the work plan. He agreed with the issues identified in the Chairman's memo, and that many improvements need to be made with regard to conflicts of interest. He stated that there needed to be more specificity from the agencies when they file their conflict of interest codes, about which specific positions in that agency are subject to filing statements of economic interest. He also stated that there needed to be a better system at the point of hiring that would include some sort of explicit indication and acknowledgement of whether or not the new hire is a designated employee and subject to filing a statement of economic interest. Mr. Knox stated that once employees are at the point of hiring, and are identified as a designated employee, there needed to be a tracking system to indicate whether that person has actually filed the statement of economic interest. These suggestions did not require a lot of agency resources.

Mr. Knox believed that there needed to be a means for providing training for state agency General Counsels so that they will be better able to provide advice and oversight of the statements of economic interest. He encouraged the Commission to develop a system of random audits for potential conflicts.

Chairman Getman noted that there is an intensive system for keeping track of all of the statements of economic interest that are supposed to be filed with the FPPC, and for keeping track of which employees are supposed to be filing each year. The FPPC has also held intensive training of state agency General Counsels on these issues. The Commission will consider whether what they are doing is enough.

Commissioner Scott agreed with both Ms. McAndrews and Mr. Knox. She believed that the Commission is often pushed into more minutiae than necessary because of the way the Commission operates. She urged the Commission look at enforcement and look at conflicts as part of enforcement without as much detail as is proposed. It is not necessary to look at the counts and fines, but it is important to look at the purpose of enforcement and the purpose of conflict of interest. She suggested that the Commission find ways to use the limited resources available by letting people know about the work of the Commission, giving the public a chance to utilize those resources. She questioned what the Commission was doing within the agency with people that the Commission has jurisdiction over.

Commissioner Scott stated that the LA Care conflict issues discussed earlier in the day is a good example. She did not agree that the codes should be reviewed, but that limited staff resources should be used to determine what the Commission is already doing and meeting with boards, commissions, and legislative staff to look at areas of enforcement.

Commissioner Scott explained that a broad policy issue needs to be explored, looking at the work of the Commission. She believed that this could be done by using the limited resources without imposing a lot more on staff, and the public would get a better understanding of why the Commission enforces, but concentrating on conflicts of interest. She would rather let enforcement staff decide the fines and the counts, and the Commission decide their role and their purpose, and tells the public what they are doing about the issues.

Commissioner Knox stated that he favored devoting resources to an examination of the conflict of interest matters because those issues have more of an effect on the public. Questions earlier in the year regarding whether the system was adequate signalled a need to address the issues. Staff identified several areas to look at and more were added by Mr. Knox. The Secretary of State provided a list of 10 items, and Commissioner Knox suggested that staff start there to discern whether the conflict of interest rules are serving the purpose for which they were intended.

Commissioner Scott stated that it had been suggested to her that the Commission should consider levels of reporting. Some people may not have to report the same information that others report, and it could lead to less work to complete the forms.

Commissioner Knox agreed, noting that it is not only the high level people who make big decisions and may be under-reporting or not reporting, but local officials with modest, part-time responsibilities may be scared off from assuming those responsibilities because of the complications of filling out the statements of economic interest.

Commissioner Swanson stated that it is very important for every board to visit its policy issues and determine how it is doing. She noted that budget constraints require the Commission to make priority decisions. She believed that the two priorities identified in the Chairman's memo were not necessarily mutually exclusive, and that, with some refinement, both can be accomplished providing that they focus on specifics in the Enforcement policy review and identify the purpose of Enforcement. She stated that Enforcement should make their own impartial decisions, but that the staff needs to know what policies the Commission is looking at.

Commissioner Swanson stated that the Commission should identify whether the fine or the violation is the issue in those Enforcement cases. They should also consider the number of personnel hours used on a case. She did not think that monthly meeting reports are necessary and could be done on a quarterly basis. However, if there are very important cases the Commission should know about them. There needs to be a policy for disposition of violations. The Commission should do everything it can to inform the public of what it is doing. She felt some frustration that the Commission deals with "immediate fires," and does not have time to look at a bigger picture. She wanted both priorities addressed next year.

Commissioner Downey stated that the enforcement policy review should be the focus for next year instead of the conflict of interest issues. It has been a dozen years since the role of the enforcement division has been reviewed and it should be revisited. The consistency of enforcement penalties should be addressed. He was concerned that the Commission should not get involved in the conflicts of interest issues because those discussions could become very politicized. He noted that the Secretary of State has proposed some legislative changes to the conflict of interest rules and that if the Commission gets involved in it they could be caught in the middle of competing political points of view.

Commissioner Downey noted that he was mindful that staff was losing two very senior members of the enforcement staff and that the resource allocation presented a problem. He urged the Commission to prioritize the enforcement policy review.

Commissioner Scott stated that the issue of trust in government is ever a political issue, and that the Commission can have an important role separate and apart from the specifics of particular statements that have been made about particular conflicts. The Commission should not worry that, by raising the issue of whether people have faith that their public officials will not have conflicts, the issue becomes politicized. Once the Commission deals with particular cases, they are matters for enforcement and are not discussed publicly until they are presented to the Commission. Exploring the policy issue would be positive and progressive, and the Commission should do what it would ordinarily do, especially when it has been demonstrated to the Commission that it is a very important issue.

Commissioner Scott thanked Senior Commission Counsel Mark Soble for all his help over the years.

Commissioner Swanson echoed Commissioner Scott's thanks and stated that the Commission would miss him.

The Commission adjourned for a short break at 4:00 p.m.

The Commission reconvened at 4:05 p.m.

Chairman Getman stated that she preferred that the Commission do the enforcement review because the Commission has not done this in many years. She agreed that the public has misconceptions about the role of the Commission with regard to the conflicts of interest, but that there are many more misconceptions about the role of the Commission with regard to enforcement issues. The public does not have a good understanding of the enforcement policies, procedures and goals are, and they should. That will not happen unless the Commission sets aside time in public meeting to air those issues.

Chairman Getman agreed that the enforcement division has been hit hard by staff movements and by the hiring freeze and that it will impose a burden on the enforcement staff. She noted that the Commission looks for a certain level of case movement and fines each year and that taking the time to do a policy discussion would require an acknowledgement that the Commission should ease those expectations so that staff has the time for the policy discussions. She asked whether the Commission was willing to see less cases moved next year in exchange for the policy discussions. She believed that this would create better communication between enforcement division and the Commission.

Chairman Getman noted that the Commission has been drawn into discussions of the conflict of interest codes and statement of economic interest whether they like it or not. She had major concerns that this would become a campaign issue and stated that she would fight to ensure that the Commission does not become a campaign forum. She thought it would be a mistake for other people to inform the debate for the Commission, and agreed that it was important to educate the public about what the Commission does. She discussed the efficiency of the FPPC's SEI reporting system. She noted that she has advocated that conflict of interest codes be more tailored, noting that there is no way that the state can keep track of the statements of economic interests in any meaningful way if every employee has to disclose so much.

Chairman Getman stated that the Commission's own conflict of interest code is under review and will be greatly tailored from previous years. The Commission should encourage other agencies to do that tailoring and free up resources to do more focused training. However, staff time would have to be made available to provide education to other agencies, and inform the Commission and the public about their efforts. If this is not done, others will be trying to define the debate in an area that is the jurisdiction of the FPPC and no other agency.

Chairman Getman agreed that the Commission should look at both of the areas. In order to do this, the Commission must free up staff time for the policy reviews. She proposed that the Commission set aside a half or full day of a Commission meeting in Spring or Summer to discuss enforcement policies and priorities on some focused areas, exploring what the Commission does and how it does it. At that time, the Commission may decide to continue the process if it is helpful and fruitful. Similarly, she suggested that the Legal and Technical Assistance division staff develop a report for the Commission exploring what kind of review conflicts of interest codes receive from the FPPC. This would include what kind of standards are used and how the FPPC assesses what statements of economic interests are filed or have to be filed, and whether they have been filed. This way, the Commission could focus some of the proposals and explore better ways to keep people from "falling through the cracks."

Chairman Getman proposed that the Commission set aside a half day in the Spring or Summer to do an initial look at enforcement, and to ask the Legal and Technical Assistance Division to report on the current system. At that time the Commission can decide which areas they should continue to look at.

Commissioner Scott suggested that, if staff identifies cases that should not be pursued the Commission could review them to see whether they should be dropped. Both the enforcement and conflict of interest issues create more work for staff, but she encouraged staff to be creative and see this as an opportunity to brainstorm to find ways to make the FPPC's work more efficient.

Commissioner Swanson stated that she preferred starting these projects in March. She also complimented staff on their preparation and reports that they supply to the Commission for their meetings. She suggested that the Commission may not need as much detail for the proposed projects.

Chairman Getman preferred that staff be allowed to review their workloads and propose whatever adjustments they deem necessary, and present proposals to the Commission at the December meeting on ways to accomplish both discussions.

Commissioner Scott noted that staff was working on a report discussing the FPPC's work on conflicts.

Chairman Getman responded that there is a pamphlet available discussing the system in general.

Commissioner Scott asked whether staff could prepare an outline of the tracking of those reports at the next meeting.

Chairman Getman responded that staff will try to start that, but that it may involve a lot of work and is unlikely to be done in time for the December meeting.

Commissioner Scott stated that there have been memos written by staff that underscore issues discussed and suggested that those memos be circulated among staff to speed up the process.

Item #13. Executive Director's Report

Executive Director Mark Krausse presented the proposed FPPC conflict-of-interest code, amended to more narrowly tailor reporting requirements. The proposed code expanded the categories from 3 to 6, assigning those categories to positions within the agency. It adds new positions that came about as a result of the addition of the Public Education Unit and deletes disclosure for some positions that do not make governmental decisions. It changes the code to better conform with the requirements as interpreted by the FPPC's own opinions.

Commissioner Swanson moved that the conflict-of-interest code be approved.

Commissioner Downey seconded the motion.

Mr. Krausse noted that staff suggested adding to page 5, category 2, "Agencies that provide legal support services to…" He noted that there is no obligation to amend current reports.

Commissioner Scott asked that staff further explore disclosure and the question of whether a conflict exists.

Mr. Krausse responded that her concerns will be addressed in a future staff presentation to the Commission. He noted that the two questions involve two different areas of the PRA.

In response to a question, Mr. Krausse stated that a brochure published by the Commission addresses questions of whether a person can vote.

In response to a question, Mr. Krausse stated that the additional language would include legal process servers.

There was no objection to including the additional language in the conflict of interest code.

There being no objection, the motion carried.

Chairman Getman suggested that staff disseminate the code with the changes to show other agencies the kind of tailoring that can be done.

Item #7. Regulation Calendar for the Year 2002: Setting of Priorities

Staff presented the proposed 2002 regulation calendar.

Chairman Getman explained that the proposed calendar will be presented to the Commission in December 2001 for final approval. She noted that it is reviewed quarterly.

Items #9, #10, #11, #12.

Commissioner Swanson moved approval of the following items:

Item #9. ***In the Matter of Elihu Harris, Oakland Citizens for Accountable Government and Friends of Elihu Harris,*** **FPPC No. 96/708.** (5 counts.)

Item #10. ***In the Matter of Ivar Plescov,*** **FPPC No. 01/227.** (1 count.)

Item #11. ***In the Matter of Enid Joffe,*** **FPPC No. 2001/433.** (1 count.)

Item #12. ***In the Matter of Marisela Torres,*** **FPPC No. 2000/576.** (1 count.)

There being no objection, the motion carried.

Item #15. Legislative Report.

The Legislative Report was taken under advisement.

Item #16. Litigation Report

The Litigation Report was taken under advisement.

CLOSED SESSION

Chairman Getman reported that pending litigation and personnel were considered during closed session.

The meeting adjourned at 4:25 p.m.

Dated: December 7, 2001

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman